86-940

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PACIFIC FIRST FEDERAL SAVINGS BANK,
PRICE WATERHOUSE and
KAPLAN, SMITH & ASSOCIATES, INC.,
Petitioners,

v.

WAYNE C. REMBOLD, KAREN D. REMBOLD,
DARRELL STEELE and LYLE SCHNEIDER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES F. VULLIET
STEVEN D. PHILLIPS
JONES, GREY & BAYLEY, P.S.
3600 One Union Square
Seattle, Washington 98101
(206) 624-0900

JAMES H. SCHROPP
(Counsel of Record)
JACK B. GORDON
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Including
Professional Corporations)
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7000

Attorneys for Pacific First Federal Savings Bank

GARR M. KING
KENNEDY, KING & ZIMMER
2600 PacWest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 228-6191

ARTHUR C. CLAFLIN
BOGLE & GATES
Bank of California Center
900 4th Avenue
Seattle, Washington 98164
(206) 682-5151

Attorneys for Price Waterhouse

ROGER L. MEYER
MEYER, HABERNIGG & WYSE
900 S.W. Fifth Avenue
Suite 1900
Portland, Oregon 97204
(503) 228-8448

CHARLES LEE EISEN
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-9077

Attorneys for Kaplan, Smith & Associates, Inc.

QUESTION PRESENTED

Can the exclusive jurisdiction which Congress vested in the courts of appeals to review challenges to the terms and conditions by which a federally-chartered savings bank converts from mutual to stock form of ownership, pursuant to the regulatory approval of the Federal Home Loan Bank Board, be subverted by casting the challenge in terms of a claim for alleged violations of federal securities laws?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed, except that the following persons, who were plaintiffs in the District Court, voluntarily dismissed their claims while the case was pending in the Court of Appeals:

Clint Hergert
Henry Griffin

Additionally, petitioner Pacific First Federal Savings Bank is a wholly-owned subsidiary of Pacific First Financial Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Pacific First Federal Savings Bank, Price Waterhouse and Kaplan, Smith & Associates, Inc., respectfully pray for a writ of certiorari to review the opinion and judgment entered in this proceeding by the United States Court of Appeals for the Ninth Circuit on September 3, 1986, reversing the District Court's dismissal of a complaint for lack of subject matter jurisdiction.

OPINIONS BELOW

The decision of the United States Court of Appeals is published at 798 F.2d 1307. It is included in the Appendix at pp. 1a-12a. The judgment and opinion of the District Court dismissing the complaint are unreported. They are included in the Appendix at pp. 13a-22a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 3, 1986. A timely petition for rehearing was filed on September 17, 1986 and denied on October 30, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

12 U.S.C. 1464(i)(2) (1982) provides:

> Subject to the rules and regulations of the [Federal Home Loan Bank] Board, any Federal association may convert itself from the mutual form to the stock form of organization, or from the stock form to the mutual form, and any Federal association may change its designation from a Federal savings and loan association to a Federal savings bank, or the reverse.

12 U.S.C. 1464(i)(4) (1982) provides:

> Any aggrieved person may obtain review of a final action of the [Federal Home Loan Bank] Board or the Federal Savings and Loan Insurance Corporation which approves, with or without conditions, or disapproves a plan of conversion from the mutual to the stock form, only by complying with the provisions of subsection (k) of section 408 of the National Housing Act [12 U.S.C. § 1730a(k) (1982)] within the time limit and in the manner therein prescribed, which provisions shall apply in all respects as if such final action were an order the review of which is therein provided for, except that such time limit shall commence upon publication of notice of such final action in the Federal Register or upon the giving of such general notice of final action as is required by or approved under regulations of the Corporation, whichever is later.

Section 408(k) of the National Housing Act, 12 U.S.C. § 1730a(k) (1982), provides, in relevant part:

> Any party aggrieved by an order of the [Federal Savings and Loan Insurance] Corporation under this section may obtain a review of such order by filing in the court of appeals of the United States for the circuit in which the principal office of such party is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the [Federal Savings and Loan Insurance] Corporation be modified, terminated or set aside. . . . Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the [Federal Savings and Loan Insurance] Corporation. . . .

STATEMENT OF THE CASE

A. Preliminary Statement

This case presents a question of vital importance to the well-being of the federal savings and loan industry and the ability of its oversight agency, the Federal Home Loan Bank Board ("FHLBB"), to exercise its powers and authority as Congress intended. At issue is the subject matter jurisdiction of federal district courts over a challenge to the terms and conditions by which a federal thrift institution converts from "mutual" to "stock" form.[1] Congress expressly provided that any such challenge be brought exclusively in a court of appeals. 12 U.S.C. §§ 1464(i)(2), 1464(i)(4), 1730a(k) (1982).

In a decision which conflicts with decisions of both the Tenth and Eleventh Circuits, the Ninth Circuit effectively ruled, in this case, that district courts may exercise jurisdiction over

[1] In the "mutual" form, certain of the customary prerogatives of ownership, including the right to vote for directors, are exercised by the depositors of an institution. In the "stock" form, such rights are, of course, exercised by the stockholders.

such challenges as long as the plaintiff artfully casts the challenge as a claim under the private damage remedies of the federal securities laws. The Ninth Circuit's decision, if allowed to stand, would replace the FHLBB's expertise, experience and Congressionally granted exclusive authority to determine the terms and conditions upon which a thrift may convert, subject to review in a court of appeals within a limited period of time, with an open-ended system in which the results of a conversion could be modified or set aside by diverse district court judges and juries at any time within the lengthy limitations period applicable to suits under the federal securities laws.

The wisdom of Congress' choice is not at issue, nor should it be. When Congress created the federal thrift industry in 1933, it entrusted the FHLBB with broad powers to supervise the industry. The FHLBB has since developed a complex regulatory scheme to take account of the well-being of individual institutions and their depositors, as well as the entire network of institutions, each dependent upon the financial integrity of the other and of the federally-backed insurance program administered by the FHLBB. Congress has authorized the FHLBB to allow institutions to convert from "mutual" to "stock" form as a means of infusing much-needed capital into individual institutions, thereby protecting the industry and the federal insurance program. Congress entrusted the FHLBB with the exclusive power to regulate conversions and expressly limited the jurisdiction of federal courts to interfere with that vital process. Among the most important facets of this regulation is the process chosen by the regulator to set the price at which stock in the converting institution is offered to the public—a decision which, in turn, determines how much capital is realized by the converting institution.

In light of the fact that chronic undercapitalization is the most fundamental and significant problem today facing the federal thrift industry, an industry Congress created over fifty years ago and which it today regards with continuing interest and considerable concern, it cannot be gainsaid that this case presents important questions of national significance.

B. Facts Material To The Question Presented

In the summer of 1983, Pacific First Federal Savings Bank ("Pacific First") converted from the "mutual" to "stock" form of ownership, under the strict supervision of, and pursuant to detailed regulations issued by, the Federal Home Loan Bank Board ("FHLBB"). Respondents, plaintiffs below, by virtue of their status as depositors of Pacific First prior to the conversion, had and exercised preferential rights to acquire conversion stock during the "Subscription Offering" phase of the conversion. *See* 12 C.F.R. § 563b.3(c)(2), (3) and (4) (1983).[2] These preferential rights are valuable because a purchaser of conversion stock effectively acquires a percentage of the pre-conversion net worth of the institution for free, since all money paid for conversion stock during the Subscription and Public Offering phases (less expenses) goes into the institution itself, thereby increasing the institution's post-conversion net worth in an amount equal to the price of the stock. Investors obtain a pro-rata interest in the entity based solely on the percentage of the new capital contributed, and the "ownership" rights of the depositors are extinguished.[3] A purchase of stock in a conversion is thus unlike the typical purchase of stock in a public offering by an issuer of its securities, which results in a redistribution of the ownership interests among the prior owners and the new investors.

FHLBB regulations dictate how the price of the conversion stock is determined. *See generally* 12 C.F.R. §§ 563b.3(c)(1), 563b.7 (1983). In particular, the FHLBB requires, among other things, that the total price of all of the stock issued and sold in the conversion equal the market value of the institution. *Id.* at § 563b.3(c)(1). This value must be determined by an independent appraisal, performed according to rigorous FHLBB guidelines and reviewed and approved by the FHLBB.

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[2] References are made to the Code of Federal Regulations in effect at the time of the Pacific First conversion.

[3] Other than a preferential right to buy stock at the same price at which it is subsequently offered to the general public, an institution's depositors receive nothing in compensation for their "ownership" interests.

To assure that full value is received, the FHLBB requires that all stock not sold during the "Subscription Offering" phase (in which the depositors participate) be sold in a subsequent "Public Offering" (in which the general investing public may participate). *Id.* at § 563b.3(c)(6). All stock must be sold at the same price per share, *id.* at §§ 563b.3(c)(10), 563b.7; accordingly, while existing depositors are granted preferential rights to acquire stock, they cannot capitalize upon an increase in the value of the institution between the time they subscribe and the actual time of the conversion. In practice, because the market value of the institution can fluctuate significantly during the conversion process—often as a result of changes in the market for thrift securities—the FHLBB requires an updated appraisal immediately before the onset of the Public Offering.[4] In order to reflect any intervening change in market value, the institution must alter either the proposed total number of shares to be sold or the proposed price per share, or both. *Id.* at § 563b.3(c)(1). Thus, under the FHLBB's regulatory structure, as disclosed in the Pacific First offering materials, purchasers during the Subscription Offering phase, in exercising their preferential rights, were required to commit to invest their money without knowing the precise price per share, the precise number of shares to be offered or—necessarily—the exact percentage of ownership in the institution the shares they purchased would represent after the conversion. *Id.* at § 563b.7(g)(3), (5).

Pacific First retained an experienced appraiser, Kaplan, Smith & Associates, Inc. ("Kaplan, Smith"),[5] to perform the independent appraisal required by the FHLBB. Kaplan, Smith's first appraisal report was issued in March 1983. As required by FHLBB regulations, Kaplan, Smith updated the appraisal prior to the onset of the Subscription Offering phase. Thereafter, in June 1983, the FHLBB authorized Pacific First to proceed with the Subscription Offering phase of the conversion

[4] *See, e.g.*, FHLBB, *Guidelines For Appraisal Reports For The Valuation Of Savings & Loan Associations And Savings Banks Converting From Mutual To Stock Form Of Organization* (Revised October 1983) at 9.

[5] During 1983 and 1984, Kaplan Smith provided appraisal services for more than half of the major public offerings of thrift institution stock.

at an aggregate price within the updated valuation range. The FHLBB also approved Pacific First's stock offering materials, which had been submitted to the FHLBB for review as part of the application process. On June 15, 1983, Pacific First distributed the Subscription Offering Circular to eligible members of the association, offering 5,800,000 shares of common stock at a "maximum subscription price" of $17.00 per share.

Pursuant to FHLBB requirements, Kaplan, Smith again updated its appraisal prior to the onset of the Public Offering. Largely as a result of changing market conditions which had increased the market value of thrift stocks generally, and a market that had proved very receptive to the Pacific First offering, the estimated market value of Pacific First had continued to increase. Pacific First submitted the update to the FHLBB and sought approval to amend its application for conversion to reflect the new valuation range, so that increased capital would be realized by increasing the number of shares to be sold. On July 19, 1983, the FHLBB gave its final approval and authorized Pacific First to sell the conversion stock in accordance with the amendment. Although the FHLBB had the authority to do so, *see* 12 C.F.R. § 563b.7(g)(3), in its discretion it did not require Pacific First to resolicit those who had committed to purchase stock in the Subscription Offering. Pacific First thereafter commenced the Public Offering phase of the conversion. Upon completion, a total of 7,480,000 shares of stock—the full number authorized by the FHLBB—were issued and sold at the price authorized and approved by the FHLBB.

In February 1985, the respondents filed a "Complaint for Securities Law Violation" in the United States District Court for the District of Oregon. The gravamen of their complaint was dissatisfaction with the valuation of the stock, the increase in the number of shares ultimately sold, and their not having been afforded an opportunity to modify or rescind their subscription phase orders in response to the increase. Although respondents cast their complaint in terms of alleged misrepresentations and omissions in the offering circular, the District Court, having before it FHLBB-certified copies of the offering materials, found that the complaint "amounts to no more than a challenge

to the conversion process as approved by the FHLBB," as to which Congress had vested jurisdiction exclusively in the courts of appeals (22a). Thus, refusing to read the complaint in a manner which would allow plaintiffs to "circumvent that exclusive review," *id.*, the District Court dismissed the action.

On appeal, the Ninth Circuit reversed. The Court of Appeals determined that the District Court had subject matter jurisdiction because, on the face of their complaint, the plaintiffs *purport* to allege violations of the federal securities laws (8a). Leaving open the issue whether the complaint truly was a sham (as the District Court had found), the Court of Appeals reasoned that Congress, while expressly vesting review jurisdiction exclusively in the courts of appeals, did not thereby "repeal" the remedies available under the federal securities law (5a). As evidence of this proposition, the Court of Appeals relied upon 12 U.S.C. § 1730a(l), *id.*, a provision which deals with bank holding companies and has no relationship to thrift conversions,[6] and upon its own view that the 30-day review period specified by Congress is "patently unreasonable" (8a). Finally, the Court of Appeals determined, as a procedural matter, that the District Court should not have dismissed for lack of subject matter jurisdiction since, in its view, any argument that the complaint constitutes only an attack upon the conversion, an issue not reached by the Court of Appeals, "should be addressed to the district court as an argument on the merits, not on jurisdiction" (11a).

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[6] The authority for conversions is contained in 12 U.S.C. § 1464(i) (1982) and 12 U.S.C. § 1725(j) (1982), each of which incorporate the procedure set forth in subsection (k) of section 1730a of title 12. Section 1730a, however, as its title indicates, deals with the regulation of bank holding companies. Subsection (l) of 1730a, relied upon by the Ninth Circuit, states that "[n]othing contained in *this section* . . . shall be interpreted or construed as approving any . . . violation of existing law. . . " (emphasis added), plainly referring to section 1730a. While the conversion statutes incorporate the procedures set forth in subsection (k), they do not incorporate subsection (l) or any other substantive portion of 1730a. Moreover, plaintiffs' complaint is precluded by the conversion statutes, not section 1730a, and the "savings" provision of subsection (l) is thus irrelevant. Nor does (l) address what *remedies* are available for "violation[s] of existing law."

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION THREATENS TO INTERFERE WITH DIFFICULT QUESTIONS CONCERNING THE VALUATION OF A FEDERALLY-CHARTERED INSTITUTION, A MATTER CONGRESS HAS ENTRUSTED TO THE FHLBB, SUBJECT TO REVIEW ONLY IN A COURT OF APPEALS, AND PRESENTS SIGNIFICANT ISSUES OF NATIONAL IMPORTANCE

Approximately 470 federal associations nationwide have converted from mutual to stock form over the past ten years under the strict supervision of the FHLBB. The trend to conversion from mutual to stock form is continuing apace. The FHLBB actively encourages these conversions since they represent the "major means of building the net worth needed to protect the thrift industry from future adversity." 49 Fed. Reg. 19,000 (May 4, 1984). The industry has been hard hit in the past and, along with the federal insurance program that supports it, has been under tremendous strain.

Congress created the federal thrift industry, and an associated program of federal insurance, in 1933, as part of a package of Depression-era reforms which it hoped would instill renewed confidence in the nation's financial institutions. Congress vested the then newly-created FHLBB with exclusive and extensive authority to charter, supervise and regulate the industry and insurance program. Indeed, as this Court has recognized, the FHLBB's complex oversight scheme governs "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *Fidelity Federal Savings and Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 145 (1982) (quoting *People* v. *Coast Federal Savings and Loan Ass'n,* 98 F. Supp. 311, 316 (S.D. Cal. 1951)). The pervasive aspect of the FHLBB's control has also been recognized by the Ninth Circuit. *Meyers* v. *Beverly Hills Federal Savings and Loan Ass'n,* 499 F.2d 1145, 1147 (9th Cir. 1974). Nevertheless, the Ninth Circuit's decision in this case would interfere with the FHLBB's power to maximize the infusion of new capital into the industry at a time when these efforts are most needed.

Although Congress' original intention was to create an industry of "local *mutual* thrift institutions in which people may invest their funds and . . . to provide for the financing of homes," Home Owners Loan Act, ch. 64, § 5(a), 48 Stat. 128, 132 (1933) (emphasis added), in 1948 Congress enacted legislation which authorized federal associations to convert to *state* stock associations.[7] In response to a substantial exodus of federal institutions, however, the FHLBB, in 1955, imposed the first of a series of administrative moratoria on such conversions. In 1973, Congress imposed a *statutory* moratorium, the only exception to which was a limited number of test cases under the close supervision of the FHLBB to enable the FHLBB to develop greater expertise and an appropriate overall approach to conversions.[8]

In October 1974, after the FHLBB published its first definitive set of conversion regulations,[9] Congress again authorized the FHLBB to approve conversions of federal institutions from mutual to stock form, although only in limited cases.[10] Congress further provided, however, that jurisdiction to review the FHLBB's activity would be vested exclusively in the United States Courts of Appeals.[11] Few conversions occurred during the period immediately following this authorization.

In the late 1970's the financial health of the industry rapidly declined, primarily as a result of sharply-rising interest rates. While the industry was locked into long-term mortgages at low interest rates, new funds could only be obtained at record-high rates; the resulting disparity threatened the capital

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[7] Act of July 3, 1948, ch.825, 1, 62 Stat. 1239; *see generally* 12 U.S.C. § 1464(i) (1982).

[8] Act of Aug. 16, 1973, Pub. L. No. 93-100, § 4, 87 Stat. 343 (codified as amended at 12 U.S.C. § 1725(j) (1976)); *see also* 12 U.S.C. § 1725(j) (1982).

[9] *See* 39 Fed. Reg. 9,142 (Mar. 7, 1974).

[10] Act of Oct. 28, 1974, Pub. L. No. 93-495, § 105(d), 88 Stat. 1504 (codified at 12 U.S.C. § 1725(j) (1976)).

[11] *Id. See* 12 U.S.C. § 1725(j)(4) (1976); 12 U.S.C. § 1725(j)(2) (1982).

structure of the entire industry and the federal insurance program which stood behind it.[12] Although the FHLBB implemented several regulatory changes designed to provide some relief, it saw conversions as a primary way of infusing sorely-needed capital into the system. In 1982, Congress broadened the FHLBB's authority to approve federal mutual-to-stock conversions, subject to FHLBB rules and regulations.[13] And, Congress again provided that jurisdiction to review challenges to such conversions, or the terms or conditions thereof, would be vested exclusively in the courts of appeals.[14]

The FHLBB's control over conversions obviously is an integral part of the entire regulatory and insurance structure which Congress entrusted to the FHLBB. As envisioned by Congress, the FHLBB has developed enormous experience over five decades: it has a unique understanding of industry problems, as well as (by virtue of its extensive examination powers) an intimate knowledge of the financial condition of each individual institution it regulates, and it has an exclusive Congressional mandate to oversee a Congressionally-created industry. As part and parcel of such oversight, the FHLBB is authorized to approve conversions on such terms and conditions as are informed by its experience, expertise and judgment.[15] Although Congress expressly placed conversions within the plenary control of the FHLBB, the Ninth Circuit's decision would make the FHLBB's final determination subject to subsequent modification in district courts throughout the country. Congress sought to protect against this possibility by expressly restricting the ability of the federal courts to review and modify the conversion-related determinations of the FHLBB to a period when the entire conversion can be reviewed

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[12] *See, e.g., Competition and Conditions in the Financial System: Hearings Before the Committee on Banking, Housing and Urban Affairs, United States Senate*, 97th Cong., 1st Sess (1981); H.R. Rep. 899, 97th Cong., 2d Sess. 87-89 (1982) (Garn-St. Germain Depository Institutions Act of 1982, Conference Report).

[13] Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469.

[14] *Id.*, § 313, 96 Stat. 1498 (codified at 12 U.S.C. § 1464(i)-(1982)).

[15] *See, e.g.*, S. Rep. No. 902, 93d Cong., 2d. Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 6119, 6122.

and a decision made as to whether or not to permit the conversion to proceed on the basis approved by the FHLBB.

By framing their complaint as a claim under the federal securities laws, respondents, with the approval of the Ninth Circuit, would upset this Congressional design. Dissatisfied depositor-investors could attack one important aspect of conversions—the value placed upon the institution, which in turn determines the price per share—in any district court in the nation simply by claiming "securities fraud." Such actions present a threat to the capital structure and stability of converted institutions, both in terms of the cost of litigation and, more so, the impact any adverse judgment might have, possibly years after the conversion, upon the financial structure of the institution. In fact, to the extent an adverse judgment would require the institution either to redeem its stock for the amount received in the conversion or, through an award of damages, reduce the purchase price thereof, the result would be contrary to FHLBB regulations prohibiting such redemptions and would effectively supplant the FHLBB's expert judgment and authority to dictate the terms and conditions of a conversion, including the aggregate purchase price of conversion stock.[16]

By channeling all conversion challenges into federal appellate courts, and by requiring all claims to be quickly asserted, Congress rationally sought to eliminate unrestrained interference with the regulatory structure and thus provide a measure of assurance that federal thrift institutions which undergo a conversion would not be subjected to destabilizing collateral attacks in private damage actions. In *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 419-23 (1965) this Court rejected any "notion that the [Federal Reserve] Board's determination may be collaterally attacked in the District Court." 379 U.S. at 421-22. As the Court observed in language apropos to this case, "the statutory review procedure set out in the Act must be utilized by those dissatisfied with the Board's

[16] For example, section 12(2) of the Securities Act of 1933 authorizes rescission as a remedy for violations thereof. This remedy would be directly contrary to FHLBB regulations prohibiting Pacific First from repurchasing its stock, except under circumstances not relevant here. *See* 12 C.F.R. § 563b.3(g)(1) (1983).

ruling . . . otherwise the commands of the Congress would be completely frustrated." 379 U.S. at 432. This Court's review is needed to ensure that Congress' express will is enforced with respect to conversions from the mutual to the stock form of ownership.[17]

II. THE NINTH CIRCUIT'S DECISION ESTABLISHES A DIRECT CONFLICT WITH THE TENTH AND ELEVENTH CIRCUITS ON AN ISSUE OF NATIONAL SIGNIFICANCE

The Ninth Circuit's decision also is in direct conflict with decisions of the Tenth and Eleventh Circuits, where similar attempts by would-be "securities law" plaintiffs to avoid the Congressionally-mandated review limitations by elevating form over substance have been rejected. *Craft* v. *Florida Federal Savings & Loan Ass'n,* 786 F.2d 1546 (11th Cir. 1986); *Harr* v. *Prudential Federal Savings & Loan Ass'n,* 557 F.2d 751 (10th Cir. 1977), *cert. denied,* 434 U.S 1033 (1978). In *Craft,* the Eleventh Circuit concluded that the plaintiffs' allegations of securities fraud were merely an attempt to avoid the exclusive review provision laid down by Congress and thus held that the district court "was without subject matter jurisdiction" to entertain the case. *Craft,* 786 F.2d at 1554. As in this case, the plaintiffs in *Craft* alleged "reliance" upon a Subscription Offering Circular which "failed to disclose" material facts about a "subsequent offering" (i.e., the Public Offering) of stock. Indeed, the alleged "nondisclosures" in the two complaints are virtually identical, relating to the alleged effect of increasing the

[17] In its decision, the Court of Appeals pointed out that FHLBB regulations preclude a converting institution from representing to investors either that the shares offered have been approved or disapproved, or that the accuracy of the statements made in the offering materials have been "passed on" by the agency (7a). While the agency's reluctance to permit itself to be cited in connection with the efforts of a converting institution to sell its stock is understandable, the prohibition against such representations does not change the fact (as the FHLBB's regulations reflect) that the FHLBB does prescribe what factors are to be taken into account in connection with the appraisal, and thus how the aggregate offering price is to be set, or the fact that the agency does review the appraisal in determining whether to approve an application to convert. *See* 12 CFR § 563b.7(d), (f).

number of shares between the Subscription Offering phase and the Public Offering phase of the respective conversions and to the fair market value of the stock.

While the Ninth Circuit sought to distinguish *Craft* by noting the Eleventh Circuit's characterization of that action as involving only "bare bones allegations" of securities fraud (10a), it is significant that the Eleventh Circuit did not grant plaintiffs in *Craft* leave to replead with specificity which, under the Ninth Circuit's analysis, should have been granted. In reality, the two cases are not meaningfully distinguishable; they are in direct conflict.

The Ninth Circuit's opinion also conflicts with the decision in *Harr*. In *Harr*, as in this case, the district court had dismissed for lack of subject matter jurisdiction an action which, although styled as an action under the securities laws, was determined to amount to a challenge to the terms of a mutual to stock conversion approved by the FHLBB. The Tenth Circuit affirmed:

> [W]e must hold that the cause of action, no matter how otherwise described, must in the first instance be a challenge to the approval by the Bank Board of the plan of conversion, and the consideration of the proxy materials. It is "The Plan" itself which is the real basis for the arguments advanced here by plaintiffs. The attempted reliance on Rule 10b-5 is at best a secondary or derivative position.
>
> • • •
>
> It does not make much difference whether this is called an exhaustion of administrative remedies, or whether it is viewed as what in reality is a challenge to the Bank Board's decision although cast in terms of Rule 10b-5. The consequences are the same, and we must affirm the trial court. The subject matter, the nature of plaintiffs' claim, and the arguments before this court demonstrate the relief sought can only be afforded by a challenge to the Bank Board's action as the basic decision and authorization for the acts and consequences complained of.

557 F.2d at 753-54. *Accord York* v. *Federal Home Loan Bank Board,* 624 F.2d 495, 497 n.2 (4th Cir.), *cert. denied,* 449 U.S. 1043 (1980).

The Ninth Circuit purported to distinguish *Harr* on the basis that the plaintiffs in *Harr* did not claim that they were induced to purchase stock in reliance on fraudulent representations made in a stock offering circular (9a). As the District Court recognized in this case (21a), however, the distinction is irrelevant since, in both cases, plaintiffs were depositor/members of the institution prior to the conversion and were essentially challenging, under the securities laws, the value of what they had received as a result of a FHLBB approved conversion. *See Harr* v. *Federal Home Loan Bank Board,* 557 F.2d 747, 749 (10th Cir. 1977), *cert. denied,* 434 U.S. 1033 (1978).

The Ninth Circuit's decision conflicts with *Craft* and *Harr* not only on the substantive issue but also as to the procedural point raised by the Court of Appeals. The Ninth Circuit ruled that any argument that the complaint, while clothed in the language of the securities laws, truly "constitute[s] an attack on the conversion," should be addressed to the District Court "as an argument on the merits, not on jurisdiction" (11a). Neither the Eleventh Circuit in *Craft,* nor the Tenth Circuit in *Harr,* ruled that such an argument is properly addressed only to the "merits" of the purported securities laws violations, and both decisions involved dismissals for lack of subject matter jurisdiction.

Moreover, in light of Congress' express pronouncement that jurisdiction over such challenges is to be vested exclusively in the courts of appeals, an analysis of the basis for the relief sought in the complaint *should* be directed towards a motion to dismiss for lack of subject matter jurisdiction. Such dismissal is appropriate where the alleged claim under the federal statutes "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . . ." *Bell* v. *Hood,* 327 U.S. 678, 682 (1946). In this regard, the District Court found that the "securities fraud" complaint in this case "amounts to no

more than a challenge to the conversion process as approved by the FHLBB." The Ninth Circuit erred in determining that it need not reach this issue on a motion to dismiss for lack of subject matter jurisdiction.

III. THE NINTH CIRCUIT'S DECISION AUTHORIZES AN UNWARRANTED EXTENSION OF JURISDICTION BASED UPON IMPLIED REMEDIES UNDER THE FEDERAL SECURITIES LAWS, IN THE FACE OF AN EXPRESS PROHIBITION AGAINST SUCH JURISDICTION

The conversion-related statutes expressly provide for exclusive jurisdiction, in a court of appeals, of any challenge to the terms and conditions of a conversion. 12 U.S.C. §§ 1464(i)(4), 1725(j)(2) (1982). In determining whether plaintiff's "securities law" action could proceed in a district court, the Ninth Circuit undertook to determine whether the exclusive review statutes divest district courts of jurisdiction over securities law violations (5a-6a). The Ninth Circuit found no express language exempting conversion stock from the securities laws nor evidence of an implied "repeal." This bootstrap analysis would unreasonably require Congress to expressly "repeal" judicially-created remedies under the securities laws, even though Congress broadly and expressly spoke on the issue of jurisdiction over challenges of any kind to the terms and conditions of conversions.

Plaintiffs purport to allege claims, *inter alia,* under section 10(b) of the Securities Exchange Act of 1934 and section 17(a) of the Securities Act of 1933. However, any remedies available under those sections have been *judicially* created. *See Herman & MacLean* v. *Huddleston,* 459 U.S. 375, 380 and nn. 9-10 (1983). It was thus inappropriate for the Court of Appeals to look for an express or implied "repeal" of judicially *implied* rights of action under the securities laws. *Cf. Dean Witter Reynolds, Inc.* v. *Byrd,* 470 U.S. 213, 84 L.Ed.2d 158, 167-168, (1985) (White, J., concurring) ("[S]olicitude for the federal cause of action—the 'special right' established by Congress-. . .—is not necessarily appropriate where the cause of action is judicially implied . . ."). The Ninth Circuit's conclusion that

plaintiffs could invoke jurisdiction under implied remedies of the securities laws, unless petitioners could establish that Congress, by expressly providing that plaintiff's challenge to the conversion could only be brought in a court of appeals, thereby "repealed" these remedies, placed an unreasonable burden on petitioners.

Indeed, as this Court has indicated on several occasions, it is the obligation of the *judicial* branch to place appropriate limitations on the availability of implied remedies under the securities laws. Such remedies are particularly inappropriate where, as in this case, Congress has provided for a comprehensive federal scheme of regulation which would be displaced by private damage remedies. In *Marine Bank* v. *Weaver,* 455 U.S. 551 (1982), for example, the Court held that section 10(b) did not provide a remedy to persons allegedly defrauded in connection with the purchase or sale of a certificate of deposit issued by a federally insured and regulated bank, in part because a comprehensive federal regulatory scheme governing the industry already existed. Citing *International Brotherhood of Teamsters* v. *Daniel,* 439 U.S. 551 (1979), in which the Court held that a pension plan regulated by the Employee Retirement Income Security Act of 1974 (ERISA) similarly was not subject to the additional remedies of the securities laws, the Court in *Marine Bank* noted:

> Since ERISA regulates the substantive terms of pension plans, and also requires certain disclosures, it was unnecessary to subject pension plans to the requirements of the federal securities laws as well.

455 U.S. at 555 n.7.

The obligation of the judicial branch to limit the availability of judicially-created remedies is even more urgent in this case since, in addition to providing a comprehensive regulatory scheme, Congress has expressly precluded the District Court's jurisdiction with respect to conversion challenges. 12 U.S.C. §§ 1464(i)(4) and 1725(j)(2). Where a statute expressly restricting subject matter jurisdiction conflicts with a judicially-created cause of action, the federal statute must prevail.

The Ninth Circuit's decision would allow the District Court to exercise jurisdiction in the face of an express statute intended to restrict its jurisdiction. Review by this Court is required to protect against an extension of subject matter jurisdiction unauthorized by Congress.[18]

[18] The Ninth Circuit also deferred to the views expressed by the Securities and Exchange Commission (SEC), as *amicus curiae*, that "there can be no question that the antifraud provisions of the federal securities laws protect defrauded purchasers of stock issued by [savings] institutions" (6a). With all due respect, the SEC's opinion is of little value since the SEC has no "mandate to interpret" the conversion statutes (7a). Moreover, the SEC's opinion is suspect since it "represents an attempt by one federal agency to reallocate, on its own initiative, the regulatory responsibilities Congress has purposefully divided among several different agencies .... The SEC by itself cannot extend its jurisdiction over institutions expressly entrusted to the oversight of ... others." *American Bankers Association* v. *SEC*, No. 85-6055, slip op. at 35-36 (D.C. Cir. Nov. 4, 1986).

CONCLUSION

For the reasons discussed above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/ JAMES H. SCHROPP

CHARLES F. VULLIET
STEVEN D. PHILLIPS
JONES, GREY & BAYLEY, P.S.
3600 One Union Square
Seattle, Washington 98101
(206) 624-0900

JAMES H. SCHROPP
(Counsel of Record)
JACK B. GORDON
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
(A Partnership Including Professional Corporations)
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7000

Attorneys for Pacific First Federal Savings Bank

GARR M. KING
KENNEDY, KING & ZIMMER
2600 PacWest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 228-6191

ARTHUR C. CLAFLIN
BOGLE & GATES
Bank of California Center
900 4th Avenue
Seattle, Washington 98164
(206) 682-5151

Attorneys for Price Waterhouse

ROGER L. MEYER
MEYER, HABERNIGG & WYSE
900 S.W. Fifth Avenue
Suite 1900
Portland, Oregon 97204
(503) 228-8448

CHARLES LEE EISEN
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-9077

Attorneys for Kaplan, Smith & Associates, Inc.

Dated: December 8, 1986

FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 85-3946

WAYNE C. REMBOLD and KAREN D. REMBOLD, DARRELL STEELE, and LYLE SCHNEIDER,
Plaintiff-Appellants,

vs.

PACIFIC FIRST FEDERAL SAVINGS BANK, a federally chartered stock savings bank in the State of Washington, PRICE WATERHOUSE & CO., a partnership, and KAPLAN SMITH & ASSOCIATES, INC., a Washington, D.C. corporation,
Defendants-Appellees.

D.C. No.
CV 85-224-FR

OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and submitted May 9, 1986
Portland, Oregon

Before: ALARCON, REINHARDT, and THOMPSON, Circuit Judges.

ALARCON, Circuit Judge:

Appellants Wayne C. Rembold and Karen D. Rembold (hereinafter the Rembolds), appeal from the district court's order dismissing their complaint against Pacific First Federal Savings Bank (hereinafter Pacific First) for lack of subject matter jurisdiction. Because the Rembolds alleged violations of federal securities laws, state securities statutes, and common law fraud and negligence, the district court had subject matter jurisdiction over this matter.

We review the dismissal of a complaint for lack of subject matter jurisdiction as a pure question of law reviewable *de novo*. *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1173 (9th Cir. 1984); *Miller v. Oregon Liquor Control Commission,* 688 F.2d 1222, 1223 (9th Cir. 1982).

We construe the allegations of the complaint in favor of the pleader. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

I. PERTINENT PROCEDURAL AND FACTUAL BACKGROUND

Prior to 1983, Pacific First was a mutual savings bank owned by its depositors. In April, 1983, the board of directors submitted an application to the Federal Home Loan Bank Board (hereinafter FHLBB) for conversion of Pacific First from a mutual to a stock form of organization. The FHLBB approved Pacific First's application for conversion on June 13, 1983.

On June 15, 1983, Pacific First offered its depositors preferential rights to purchase 5,800,000 shares of conversion stock in a Subscription Offering Circular. The Rembolds purchased 328,726 shares of stock in Pacific First on or about July 16, 1983. They allege that they relied upon representations contained in the Subscription Offering Circular in purchasing shares.

The FHLBB regulations governing conversions to stock ownership require the preparation of a Subscription Offering

Circular. 12 C.F.R. § 563b.7. The offer to sell securities may not be made prior to approval of the application for conversion. *Id.* Copies of the preliminary and final offering circulars must be filed with the FHLBB. 12 C.F.R. § 563b.8(3). No representation may be made in the offering circular that "price information has been approved . . . or that the shares of capital stock sold pursuant to the plan of conversion have been approved or disapproved by the Federal Home Loan Bank Board . . . or that the Board . . . has passed upon the accuracy or adequacy of any offering circular covering such shares." 12 C.F.R. § 563b.7(d). Pacific First filed the Subscription Offering Circular as part of the application for conversion.

Price, Waterhouse and Company (hereinafter Price, Waterhouse) certified the financial statements in the circular. Kaplan, Smith and Associates, Inc. (hereinafter Kaplan, Smith) independently appraised the stock.

On February 5, 1985, the Rembolds filed this action against Pacific First, Price, Waterhouse, and Kaplan, Smith (hereinafter appellees) alleging that the Subscription Offering Circular contained fraudulent representations. The Rembolds alleged violations of the 1933 Securities Act, § 12(2), 15 U.S.C. § 771(2), and § 17a, 15 U.S.C. § 77(q)a, violations of the 1934 Securities Exchange Act § 10b, 15 U.S.C. § 78j(b), violations of Oregon and Washington state securities laws, common law fraud, and negligence. In particular, they alleged that the Subscription Offering Circular contained misrepresentations which overstated the value of Pacific First's assets in real estate and in its loan portfolio. The Rembolds also alleged that the Subscription Offering Circular contained false projections of the future earnings of Pacific First, and that it failed to disclose information regarding management strategies which would result in short term losses, and information about the magnitude, timing, and effect of a second stock offering.

The defendants filed motions to dismiss on ten separate grounds including lack of subject matter jurisdiction, failure to state a claim for relief, and failure to plead with specificity as required by Fed. R. Civ. P. 9(b). In its written Order and Opinion, the district court, after reciting each of the discrete challenges to the complaint, held that "it need only address the

issue of subject matter jurisdiction." The district court concluded that:

> [P]laintiffs' challenge to the Subscription Offering Circular and to the issuing of subsequent offerings amounts to no more than a challenge to the conversion process as approved by the FHLBB. Congress has chosen to vest review of such action exclusively in the Court of Appeals and this court will not read this complaint to circumvent that exclusive review.

It is clear from the quoted language that the district court declined to consider the merits of any of the plaintiffs' claims because of its view that it lacked jurisdiction to consider a challenge to an allegedly fraudulent and negligent stock offering made after approval of a bank conversion by the FHLBB.

II. DISCUSSION

We must decide whether in enacting the National Housing Act, 12 U.S.C. §§ 1725(j)(2) and 1730a(k), Congress intended to deprive a district court of the jurisdiction to hear common law and federal and state securities law violations in a stock offering issued after the conversion of a mutual bank to stock form of organization.

The National Housing Act of 1934, 12 U.S.C. § 1725(j), allows a mutually owned and federally regulated savings institution to convert to a stock form of ownership. Section 1725(j) provides as follows:

> (1) Except as provided in section 1464 of this title, no insured institution may convert from the mutual to stock form except in accordance with the rules and regulations of the Corporation.
>
> (2) Any aggrieved person may obtain review of a final action of the Federal Home Loan Bank Board or the Corporation which approves, with or without conditions, or disapproves a plan of conversion

> pursuant to this subsection only by complying with the provisions of subsection (k) of section 1730a of this title within the time limit and in the manner therein prescribed . . . .

Section 1730a(k) of the National Housing Act authorizes judicial review of an order approving or disapproving a conversion plan. Section 1730a(k) provides in pertinent part as follows:

> Any party aggrieved by an order of the Corporation under this section may obtain a review of such order by filing in the court of appeals of the United States . . . within thrity days after the date of service of such order, a written petition praying that the order of the Corporation be modified, terminated, or set aside . . . .

A. The National Housing Act Did Not Divest The District Court of Jurisdiction Over Securities Law Violations

The anti-fraud provisions of the 1934 Securities Exchange Act apply to the sale of stock by a savings and loan association. *Tcherepnin v. Knight,* 389 U.S. 332, 340-42 (1967). The National Housing Act does not contain any language creating an exception from the federal securities laws for stock issued as the result of a bank conversion. Instead, Congress expressed its intention *not* to repeal any law prohibiting any conduct in connection with an application for a bank conversion of the National Housing Act, 12 U.S.C. § 1730a(1). Section 1730a(1) provides in pertinent part that: "[n]othing contained in this section . . . shall be interpreted or construed as approving any- . . . violation of existing law . . . ." We believe that the plain meaning of these words is that in passing the National Housing Act Congress did not intend to preclude any existing cause of action under the antifraud sections of the securities acts or any other law.

The National Housing Act does not contain an implicit exception to the antifraud securities law under the National Housing Act. In general, implicit repeal is not favored.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 189 (1978); *Morton v. Mancari,* 417 U.S. 535, 549 (1974). If repeal is to be inferred, there must be actual Congressional intent to do so, which is "clear and manifest." *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936); *see also Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority,* 667 F.2d 1327, 1334 (11th Cir. 1982) (holding that if "clear evidence of affirmative congressional intent is lacking, we cannot infer that Congress has legislated silently."). In this case, Congress has expressed the intent *not* to except bank conversion securities from the protective provisions of existing securities laws.

In the absence of clear Congressional intention, implied repeal must be based on the fact that the statutes at issue are irreconcilable, *Morton,* 417 U.S. at 550, or there is "plain repugnance" between them. *Gordon v. New York Stock Exchange,* 422 U.S. 659, 682-83 (1975). We can find no incompatibility between the anti-fraud provisions of securities laws and the National Housing Act. Both statutes protect shareholders who purchase stock in a savings institution from violations of the law.

Our construction of the National Housing Act is shared by the Securities Exchange Commission and apparently by the FHLBB. In a comment to amendments adopted to 12 C.F.R. Parts 536b, 563c, and 563d, the Board opined as follows:

> In addition, it is desireable, and as regards the Board's 1934 Act regulations, promoted by statute, that the Board's disclosure regulations approximate those of the SEC because (1) the antifraud provision of the federal securities laws are applicable to all offers for sale of securities, assuming the use of jurisdictional means . . . .

48 Fed. Reg. 31,614, 31,615 (July 11, 1983).

In its amicus curiae brief in this matter, the Securities and Exchange Commission argues that "there can be no question that the antifraud provisions of the federal securities laws protect defrauded purchasers of stock issued by such institutions." The Securities and Exchange Commission also notes

that "[n]othing in the statutory scheme governing conversions divests jurisdiction under the securities laws for claims alleging fraud in a sale of stock by converting institution."

Under the principle of deference to administrative interpretations, we must defer to an agency's construction of the statutes it has been mandated to interpret unless that construction would not have been sanctioned by Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The Commission's conclusions are also supported by an analysis of the relevant statutes. Section 1730a(k) is limited by its terms to the right to review by a party aggrieved by an "order" of the FHLBB approving or disapproving a conversion plan. 12 U.S.C. § 1730a(k). The action is directed against the FHLBB. The relief provided by section 1730a(k) is limited to the modification, termination, or the setting aside of the order. The statute makes no reference to the right to maintain a private cause of action against the savings institution by a person who has suffered damages as the result of misrepresentations in a *stock offering circular*. In fact, the FHLBB disclaims responsibility for the accuracy of any information contained in offering circulars. 12 C.F.R. § 563b.7(d). In the face of such disclaimer, an order approving an application of a conversion plan does not relate in any way to the right of the purchaser of stock to seek damages against the savings institution for any misrepresentations in the offering circular.

The offering circular issued by Pacific First in this matter contained the following notice:

> THESE SHARES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE FEDERAL HOME LOAN BANK BOARD OR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION NOR HAS SUCH BOARD OF CORPORATION PASSED ON THE ACCURACY OR ADEQUACY OF THIS SUBSCRIPTION OFFERING CIRCULAR. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

This notice advised the Rembolds and other prospective shareholders that the FHLBB did not consider the representations contained in the stock offering circular in approving the conversion plan. Under such circumstances, a challenge in this court of the order approving the conversion plan on the ground that the savings institutions made fraudulent statements in the offering circular would appear to be futile. We would expect that the record of the proceedings before the FHLBB would be silent concerning the accuracy of any representations in the stock offering circular.

In addition, the construction of section 1730a(k) suggested by the appellees would lead to an unreasonable and unjust result. Section 1730a(k) requires that a person aggrieved by an order approving or disapproving a conversion plan file for review in this court within 30 days. A 30 day limitations period to discover the existence of fraud in a stock offering is patently unreasonable especially in those situations where the stock sale may not occur until after the deadline has expired. Whenever possible, statutes should be interpreted to avoid unreasonable results. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). We are confident that had Congress intended to make such a radical change in the statute of limitations for an action based on fraudulent representations it would have provided us with an unmistakable expression of its purpose.

We conclude that the enactment of section 1730a(k) did not divest the district court of subject matter jurisdiction over a stockholder's private cause of action against a savings institution based upon alleged misrepresentations in a stock offering circular issued following FHLBB approval of a conversion plan.

B. The Complaint Purports To Assert A Securities Law Violations

In determining that it lacked subject matter jurisdiction, the district court relied solely on the decision of the Tenth Circuit in *Harr v. Prudential Federal Savings & Loan Association*, 557 F.2d 751 (10th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978). There are critical factors that distinguish *Harr* from the matter before this court.

In *Harr*, the plaintiffs were depositors in a mutual savings institution. They received free stock following the bank's conversion to a stock form of ownership. The plaintiffs filed two actions in which they asserted that the proxy materials filed in support of the application for conversion were fraudulent. The plaintiffs sought review of the order approving the plan in an action against the FHLBB filed in the Court of Appeals for the Tenth Circuit. The decision in this matter is reported in *Harr v. Federal Home Loan Bank Board*, 557 F.2d 747 (10th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978). In this action the plaintiffs alleged, *inter alia*, that the proxy solicitation material was "misleading and false." *Id.* at 749. The *Harr* plaintiffs also filed an action against the savings institution in the district court. There they claimed that the conversion plan was "unfair and itself deceptive" which violated their rights under Rule 10b-5 of the Securities Exchange Commission. *Harr v. Prudential Federal Savings*, 557 F.2d 752.

The Tenth Circuit's opinions in each matter were written by the same circuit judge and decided on the same date. The Tenth Circuit concluded that the complaint filed in the district court was "directed to matters which are part and parcel of the plan of conversion approved by the Board." *Harr v. Prudential Federal Savings*, 557 F.2d at 754. The court explained its decision as follows:

> The subject matter, the nature of plaintiffs' claim, and the arguments before this court demonstrate that the relief sought can only be afforded by a challenge to the Bank Board's action as the basic decision and authorization for the acts and consequences complained of.

Id. at 754.

In *Harr* no claim was made, as in the instant matter, that fraudulent and negligent representations were made in a stock offering circular. No allegation was made that the plaintiffs suffered monetary losses because they were induced to purchase stock in reliance on fraudulent representations. Instead, the primary objective of the plaintiffs in *Harr* was to set aside, or

terminate the order because of deceptive fraud in the plan for conversion. The Tenth Circuit did not suggest that the National Housing Act precludes a private cause of action against a savings institution based on fraudulent representations in an offering circular. This issue was not before the court in *Harr*.

After the briefs were submitted in this matter, appellees furnished this court with a copy of the decision of the Eleventh Circuit in *Craft v. Florida Federal Savings & Loan Association*, 786 F.2d 1546 (11th Cir. 1986). The *Craft* case does not assist us in our task. The Eleventh Circuit was not presented with the question we must decide. The court in *Craft* reviewed the complaint and concluded as follows:

> We view the Crafts' anti-fraud claims as bare bones allegations made to escape the exclusive review provisions of the Review Statutes. They do not allege any false or misleading statements. The allegations concerning Kidder's final appraisal are conclusory and fail to show that they made any purchases in reliance on it. Kidder is not named as a defendant in this action. All of the claims derive from Crafts' basic contention that they were entitled by the Bank Board's regulations to be restricted after the Bank Board approved the updated appraisal and the issuance of additional conversion stock.

Id. at 1554.

Unlike the complaint before the court in *Craft*, the Rembolds' claims contain more than "bare bones allegations" of fraud. They allege that they acted in reliance on false representations in making purchases of stock. They have named the appraisers as a party. They did not base their complaint on an alleged violation of any regulation of the FHLBB regarding the approval of a conversion plan. Instead, the Rembolds claim they were defrauded as a result of their reliance on representations in the stock offering circular.

Finally, the Eleventh Circuit in *Craft* carefully warned against reliance on its decision to resolve issues not addressed.

> Before departing from this subject we add this word of caution. We are not called upon here to decide, nor do we express any views concerning the jurisdiction *vel non* of the district court under the federal securities laws when securities fraud is properly alleged and there has been Bank Board approval of a savings and loan conversion.

Id.

III. CONCLUSION

The district court erred in its conclusion that it lacked subject matter jurisdiction over the fraud claims alleged by the Rembolds. The review provisions of the National Housing Act regarding challenges to orders of the FHLBB do not apply to a private cause of action against a savings institution for fraudulent representations in a stock offering circular.

The only issue before this court is whether the district court had subject matter jurisdiction over the Rembolds' complaint. We need not address appellee's argument that the Rembolds have "not really" asserted security violations but have "bootstrapped" their opposition to the conversion into securities law and common law fraud claims. We have noted that the district court is not deprived of jurisdiction because of the inclusion of those claims. Appellee's argument that the alleged misrepresentations do not actually go to the securities law and common law fraud claims, but rather constitute an attack on the conversion, should be addressed to the district court as an argument on the merits, not on jurisdiction. *See generally Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 477-78 (1977) (upholding dismissal of complaint alleging faulty corporate business judgment rather than genuine securities violations); *Panter v. Marshall Field & Co.,* 646 F.2d 271, 287-88, 299 (7th Cir. 1981) (dismissing "bootstrap" claim). We have not determined nor do we express any opinion on the merits of the allegations in the complaint under Fed. R. Civ. P. 9(b) or 12(b)6 or 56. Those issues must first be addressed by the district court.

The Clerk of this Court is directed to calendar any further appeals in this matter before this panel.

The judgment is REVERSED.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Civil No. 85-224-FR

WAYNE C. REMBOLD and KAREN D. REMBOLD,
CLINT HERGERT, HENRY GRIFFIN,
DARRELL STEELE, and LYLE SCHNEIDER,
Plaintiffs,

v.

PACIFIC FIRST FEDERAL SAVINGS BANK, a federally chartered stock savings bank in the State of Washington;
PRICE WATERHOUSE & CO., a partnership; and
KAPLAN, SMITH & ASSOCIATES, INC.,
a Washington, D.C. corporation;
Defendants.

JUDGMENT

Based on the record,

It is ORDERED AND ADJUDGED this action is dismissed.

DATED this 17th day of May, 1985.

Helen J. Frye
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Civil No. 85-224-FR

WAYNE C. REMBOLD and KAREN D. REMBOLD, CLINT HERGERT, HENRY GRIFFIN, DARRELL STEELE, and LYLE SCHNEIDER,
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PACIFIC FIRST FEDERAL SAVINGS BANK, a federally chartered stock savings bank in the State of Washington; PRICE WATERHOUSE & CO., a partnership; and KAPLAN, SMITH & ASSOCIATES, INC., a Washington, D.C. corporation;
Defendants.

OPINION AND ORDER

JUSTINE FISCHER
N. ROBERT STOLL
DANIEL H. ROSENHOUSE
STOLL & STOLL, P.C.
735 SW First Avenue
Portland OR 97204
Attorneys for Plaintiffs

CHARLES F. VULLIET
JONES, GREY & BAYLEY, P.S.
One Union Square, 36th Floor
600 University
Seattle WA 98101
JAMES H. SCHROPP
FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
Suite 1000
600 New Hampshire Ave., NW
Washington, DC 20037
Attorneys for Defendant Pacific First Federal

ARTHUR CLAFLIN
BOGLE & GATES
Bank of California Center
Seattle WA 98164

GARR M. KING
KENNEDY, KING & ZIMMER
1211 SW Fifth Avenue, Suite 2500
Portland OR 97204
Attorneys for Defendant Price Waterhouse & Co.

ROGER L. MEYER
MEYER & WYSE
421 SW Sixth Avenue, Suite 1212
Portland OR 97204

CHARLES LEE EISEN
JONATHAN EISENBERG
KIRKPATRICK & LOCKHART
1900 M Street, NW
Washington, DC 20036
Attorneys for Defendant Kaplan, Smith & Assoc.

FRYE, Judge:

This action arises from the conversion of the Pacific First Federal Savings Bank (Pacific First) from the mutual to the stock form of ownership in mid-1983. Plaintiffs are investors who purchased securities in connection with the conversion. Defendant Pacific First is a federally chartered stock savings bank. Defendant Kaplan Smith & Associates, Inc. (Kaplan Smith) is a diversified consulting firm that provides a range of financial, economic, and management consulting services to thrift institutions, commercial banks, and other financial service companies. Defendant Price Waterhouse & Co. (Price Waterhouse) is a firm of independent accountants with offices throughout the United States.

BACKGROUND

In 1933, Congress enacted the Home Owners' Loan Act which authorized the creation of federally chartered mutual savings and loan associations and allowed previously chartered state associations to convert to federal associations. In 1934, Congress enacted the National Housing Act, which created the Federal Savings and Loan Insurance Corporation (FSLIC). The FSLIC operates under the direction of the Federal Home Bank Board (FHLBB) and insures savings accounts maintained in federal savings and loan institutions.

In 1973, Congress enacted section 402(j) of the National Housing Act, which gave the FHLBB authority to approve the conversion of federal mutual associations into federal stock associations. On March 7, 1974, the FHLBB published the first set of conversion regulations.

The FHLBB regulations in effect at the time of the Pacific First conversion included the following requirements:

(1) adoption of a formal plan of conversion;

(2) publication of the plan;

(3) filing an application for conversion with the FSLIC;

(4) preparation of an independent appraisal of the market value of the institution, and review and approval of the appraisal by the FSLIC;

(5) approval of the plan of conversion by the association's members;

(6) the sale of the converting association's securities to those members of the association who wish to purchase them, in a so-called "Subscription Offering," prior to any offer to the public; and

(7) the sale of the remaining securities in a direct community and/or public offering.

Pacific First converted from a "mutual" to a "stock" savings bank in the summer of 1983, pursuant to a plan of conversion adopted by its Board of Directors in February, 1983 and approved by its members in July, 1983. An application for conversion was submitted to the FHLBB in April, 1983 and was approved by the agency in June, 1983. Pacific First retained Kaplan Smith to perform the independent appraisal required by the FHLBB and used in the circular. Price Waterhouse audited the books and certified the financial statements used by Pacific First in the circular.

On June 15, 1983, Pacific First distributed the Subscription Offer Circular to its members offering the securities for sale. This Subscription Offer closed on July 16, 1983. Plaintiffs purchased stock in Pacific First on or about July 17, 1983 pursuant to this Subscription Offer.

Plaintiffs bring this action under common law and federal and state securities laws based upon this initial offering of stock. Plaintiffs allege in their complaint that the circular was misleading in several respects. Plaintiffs allege that the value of Pacific First's assets in real estate and loan portfolio was overstated and that this overstatement was accompanied by an inadequate reserve to cover losses, as well as an overstatement of earnings in the event of a successful stock offering. Plaintiffs allege that the circular (1) failed to disclose a management strategy that anticipated virtually assured near-term losses; (2) failed to disclose the magnitude or timing of a second offering of stock; (3) failed to disclose that the size and nature of the second offering had been determined prior to plaintiffs' purchases; and (4) failed to disclose the effect the second offering would have on the plaintiffs. Plaintiffs allege that while the circular was prepared by Pacific First, defendants Kaplan Smith and Price Waterhouse played critical roles.

In the matter before the court all three defendants move the court pursuant to Fed. R. Civ. P. 12 for an order dismissing the complaint for one or more of the following reasons:

1. This court lacks subject matter jurisdiction over the matters alleged in the complaint;

2. The complaint fails to plead fraud with the specificity required by Fed. R. Civ. P. 9(b);

3. Plaintiffs do not have an implied right of action under either section 17(a) of the Securities Act of 1933 or section 10(b) of the Securities Exchange Act of 1934;

4. Plaintiffs have not, as a matter of law, suffered damages as a result of the "subsequent offering" alleged in paragraph 10 of the complaint;

5. Plaintiffs have not pleaded the elements of a violation of section 12(2) of the Securities Act of 1933;

6. Plaintiff Wayne Rembold fails to state a claim for relief since he was not in privity with Pacific First nor is he alleged to have ever purchased Pacific First stock;

7. Plaintiff Karen Rembold fails to state a claim for relief since the complaint alleges that she suffered no damages;

8. Count Seven of the complaint fails to state a claim for relief under the law of Oregon;

9. Count Ten fails to state a claim for relief since Pacific First did not owe a fiduciary duty to plaintiffs; and

10. This court lacks pendent jurisdiction over plaintiffs' state law claims.

ANALYSIS

Because of the court's disposition of this matter, it need only address the issue of subject matter jurisdiction.[1]

Defendants contend that plaintiffs' action is no more than "a challenge, in this court, to the FHLBB's review and approval of the price subscribers paid for shares of Pacific First stock, as well as the FHLBB's authorization to increase the number of

[1] Although it is not necessary to reach this issue, the court has serious doubts that defendants Kaplan Smith and Price Waterhouse are "sellers" under section 12(2) of the 1933 Act.

shares offered without allowing subscribers the opportunity to increase, decrease, or rescind their subscriptions." As a result, defendants contend that *exclusive* jurisdiction to review the actions of the FHLBB is vested in the United States Court of Appeals by section 402(j)(2) of the National Housing Act which provides in relevant part that:

> [A]ggrieved person[s] may obtain review of a final action of the [FHLBB] or the [FSLIC] *which approves, with or without conditions,* or disapproves *a plan of conversion . . . only* by complying with the provisions of subsection (k) of section 408 of this title [12 U.S.C. § 1730(k)] within the time limit and in the manner therein prescribed, which provisions shall apply in all respects as if such final action were an order the review of which is therein provided for. (Emphasis added.)

Section 408(k) in turn provides, in part:

> Any party aggrieved by an order of the [FSLIC] under this section may obtain a review of such order by filing in the court of appeals of the United States for the circuit in which the principal office of such party is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the [FSLIC] be modified, terminated or set aside. . . . Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the [FSLIC].

Plaintiffs respond to the defendants' position by asserting that they do not challenge the fact or the right of Pacific First to convert to stock ownership, the price at which Pacific First chose to offer its stock, the right of the FHLBB to allow the conversion or the procedure by which the FHLBB gave its approval. Plaintiffs contend that they "simply claim that material misrepresentations and omissions were made in the ultimate sale of the securities." Plaintiffs contend that the

FHLBB regulations do not usurp the role of the securities law in protecting the public from investor fraud and that while the FHLBB regulates the procedure and form of the conversion, the content and accuracy of the information presented remains subject to securities law.

Defendants contend that plaintiffs are attempting to evade the exclusive review provisions of the National Housing Act by casting their complaint in the language of a securities claim. Defendants assert that the Federal Home Board regulations specifically address the issue of misleading materials in the conversion process and point to 12 C.F.R. § 563b.3(h) which states:

> (h) *Manipulative and deceptive devices.* In the offer, sale or purchase of securities issued incident to its conversion, no insured institution, or any director, officer, attorney agent or employee thereof, shall: (1) Employ any device, scheme, or artifice to defraud, or (2) obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) engage in any act, transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser or seller.

In support of their position, defendants rely upon the case of *Harr v. Prudential Federal Savings and Loan Association,* 557 F.2d 751 (10th Cir. 1977), *cert. denied* 434 U.S. 1033 (1978). In *Harr,* plaintiff brought an action alleging that a plan to convert a mutual association to a stock association was part of a conspiracy by the directors to benefit themselves and the officers and that the proxy materials were deceptive and misleading. The district court dismissed the action for lack of subject matter jurisdiction, on the grounds that the action amounted to a challenge to the FHLBB's approval of the

conversion and jurisdiction to review was vested in the court of appeals. The court of appeals affirmed, explaining:

> . . . [W]e must hold that the cause of action, no matter how otherwise described, must in the first instance be a challenge to the approval by the Bank Board of the plan of conversion, and the consideration of the proxy materials. It is "The Plan" itself which is the real basis for the arguments advanced here by the plaintiffs. The attempted reliance on Rule 10b-5 is at best a secondary or derivative position.
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> It does not make much difference whether this is called an exhaustion of administrative remedies, or whether it is viewed as what in reality is a challenge to the Bank Board's decision although cast in terms of Rule 10b-5. The consequences are the same and we must affirm the trial court. The subject matter, the nature of plaintiffs' claim, and the arguments before this court demonstrate that the relief sought can only be afforded by a challenge to the Bank Board's action as the basic decision and authorization for the acts and consequences complained of. 557 F.2d at 754.

Plaintiff contends that this case is different from *Harr.* Plaintiff points to the fact that plaintiffs in *Harr* were depositors in the mutual association and had not purchased any stock and that plaintiffs in this case, unlike in *Harr,* do not seek a remedy for the decision by the FHLBB to allow a conversion.

Plaintiffs in *Harr* were depositors who complained of the amount of "free" stock they had received in the stock distribution pursuant to the conversion. In *Harr,* as in the case before the court, plaintiffs received their right to acquire stock from their status as depositor/members. The court does not find this distinction convincing.

CONCLUSION

The critical issue in this case is whether plaintiffs' challenge is in reality "wholly a consequence of the Board's approval of the [conversion] plan." 557 F.2d at 754. The court finds that plaintiffs' challenge to the Subscription Offering Circular and to the issuing of subsequent offerings amounts to no more than a challenge to the conversion process as approved by the FHLBB. Congress has chosen to vest review of such action exclusively in the Court of Appeals and this court will not read this complaint to circumvent that exclusive review.

IT IS ORDERED that the motions to dismiss of defendants Pacific First, Kaplan Smith, and Price Waterhouse are GRANTED.

DATED THIS 17th day of May, 1985.

Helen J. Frye
United States District Judge